

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN LEE SLADE,

Defendant-Appellant.

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UNPUBLISHED

March 11, 2003

No. 238129

Benzie Circuit Court

LC No. 01-001733-FC

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant Brian Lee Slade appeals as of right his jury trial conviction of second-degree murder.<sup>1</sup> The trial court sentenced Slade to life imprisonment. We affirm.

I. Basic Facts And Procedural History

On September 20, 2000, police officers found Debra Barth's body in the basement of the home she shared with Slade. Michael David Salagovich, a friend of Barth and Slade, testified that they came over to his house on September 14, 2000, and that both were drunk. Salagovich said Slade was "being kind of physical with Debbie" and was poking Barth in the head. Salagovich said he heard Barth say "get your hands off my neck and leave me alone, keep your hands off me."

Later, when no one could contact Barth, the police were called. After some investigation, the police officers obtained a search warrant and found Barth's body. Barth was buried underneath many items and was not initially found when the police officers searched the basement. The police then arrested Slade at a grocery store. The police read Slade his *Miranda*<sup>2</sup> rights and he waived those rights. Benzie County Deputy Sheriff Detective Troy Allen Lamerson and former Benzie County Sheriff Department Deputy Sheriff Jimmy Davis testified that Slade said he awoke in the morning, saw Barth dead, and "freaked out." According to Detective Lamerson, Slade said he could not remember what happened. During the interview, Slade also said Barth had attacked him with a knife in the past. The police audiotaped a later

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<sup>1</sup> MCL 750.317.

<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

interview with Slade and when this tape was played for the jury, there was a reference to a polygraph examination. Slade moved for a mistrial, and the trial court denied this motion.

Forensic pathologist Stephen Cohle, M.D., testified that Barth's death was a homicide and that she had numerous scrapes and bruises on her body. Dr. Cohle testified about Barth's rib fractures and stated "except for the first rib, they were all fractured in the front, both sides. On the right side they were all fractured except for the 1st rib and the 4th through the 12th ribs were fractured on the left side next to the backbone." Dr. Cohle testified Barth was alive when she received the fractures. Dr. Cohle also testified that blunt trauma or blunt force had been applied to the right side of Barth's head. Dr. Cohle said Barth's cause of death was the multiple rib fractures and that she would not have been able to breathe because of her rib fractures. Dr. Cohle also testified he had not seen rib fractures similar to Barth's except in motor vehicle crashes, and the rib fractures were caused by multiple instances of a great amount of blunt force. Dr. Cohle said multiple kicks or stomps could have caused the fractures and, while punching could have caused the injuries, the person punching would have to punch with the force of a professional boxer.

The jury convicted Slade of second-degree murder for which the trial court sentenced him to life imprisonment. This appeal followed.

## II. Mistrial

### A. Standard Of Review

Slade asserts that the trial court abused its discretion by denying a mistrial when the jury heard a hearsay statement and reference to a polygraph examination. We review a trial court's decision to grant or deny a mistrial for abuse of discretion.<sup>3</sup> An abuse of discretion "will be found only where denial of the motion deprived the defendant of a fair and impartial trial."<sup>4</sup>

### B. Hearsay

In this case, a police officer's testimony included a hearsay statement. An unresponsive, volunteered answer to a proper question is not cause for granting a mistrial.<sup>5</sup> In *Lumsden*,<sup>6</sup> this Court determined a mistrial was not warranted when a witness inadvertently referred to other homicides allegedly committed by the defendant. This Court stated the reference was fleeting and not emphasized to the jury.<sup>7</sup> Similarly, here, the officer's comment about Barth's death was brief and inadvertent.<sup>8</sup> Importantly, the officer's comment was merely a summary of other testimony. The forensic pathologist testified Barth suffered multiple rib fractures that caused her

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<sup>3</sup> *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

<sup>4</sup> *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990).

<sup>5</sup> *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

<sup>6</sup> *Lumsden*, *supra* at 296-300.

<sup>7</sup> *Id.* at 299.

<sup>8</sup> *People v Holly*, 129 Mich App 405, 416; 341 NW2d 823 (1983).

to be unable to breathe and that she was alive when she received the fractures. The testimony indicated Barth died a painful and horrific death, and the jury was not improperly influenced by the police officer's hearsay statement of the obvious.

### C. Polygraph Examination

While listening to an audiotaped police interview with Slade, the jury also heard reference to the possibility that he could take a polygraph examination. Normally, reference to a polygraph examination is not admissible before a jury.<sup>9</sup> It is a bright-line rule that reference to taking or passing a polygraph examination is error.<sup>10</sup> However, merely referring to a polygraph examination does not always constitute error requiring reversal.<sup>11</sup> For example, when the mention of a polygraph examination was brief, inadvertent, and isolated, it may not require reversal.<sup>12</sup> To determine if reversal is required, the following factors may be considered: (1) whether the defendant objected or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness' credibility; and (5) whether the results of the examination were admitted rather than merely the fact that an examination had been conducted.<sup>13</sup>

Here, we conclude the reference to the polygraph examination was inadvertent.<sup>14</sup> While the reference was due to a prosecutor error, defense counsel had been given a transcript of the interview and could have prevented the jury from hearing the reference. Importantly, there was no mention of the results of a polygraph examination or even if a polygraph examination had been taken.<sup>15</sup> Additionally, the trial court's instructions to the jury regarding the mention of the polygraph examination were thorough and explained that any reference must not be considered admissible evidence.<sup>16</sup> We conclude that the trial court properly denied Slade's request for a mistrial because the reference to a polygraph examination was brief and inadvertent and the hearsay statement was harmless because the facts were shown by other testimony.

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<sup>9</sup> *Nash, supra* at 97.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 98.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (citations omitted).

<sup>14</sup> See *People v Ortiz-Kehoe*, 237 Mich App 508, 515; 603 NW2d 802 (1999); cf. *Nash, supra* at 95, 99.

<sup>15</sup> *Nash, supra* at 98.

<sup>16</sup> See *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994); *Ortiz-Kehoe, supra* at 516.

### III. Jury Instructions

#### A. Standard Of Review

Slade asserts that the trial court erred in instructing the jury. This Court reviews a claim of instructional error de novo.<sup>17</sup> A court must instruct the jury about the law applicable to the case.<sup>18</sup> “If supported by the evidence, defendant’s theory of the case must be given.”<sup>19</sup>

#### B. Slade’s Defense

“[T]he killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.”<sup>20</sup> While a defendant may use circumstantial evidence to show he acted in self-defense,<sup>21</sup> here, Slade presented no evidence about what happened at the time Barth was murdered. The jury instructions related to self-defense and past violent conduct were not supported by evidence presented at trial. While there was testimony about Barth’s past violent conduct, there was no evidence presented to support an instruction that Slade honestly and reasonably believed his life was in imminent danger or he feared serious bodily harm on the night of the murder.<sup>22</sup>

Additionally, although the trial court read the second-degree murder instruction in its entirety; it slightly altered paragraph four. Jury instructions are viewed in their entirety.<sup>23</sup> Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant’s rights.<sup>24</sup> Here, the trial court’s omission of the words “justified” and “excused” did not create error because the instructions in their entirety fairly presented the issues. Slade presented no evidence that he acted in self-defense on the night of the murder; therefore, he presented no evidence that the murder was justified or could be excused. While Slade did present evidence of Barth’s past conduct, none of it related to the night of the murder. Therefore, we conclude that the trial court’s instructions to the jury were proper based on the evidence presented.

### IV. Prosecutorial Misconduct

Slade argues that the prosecutor made improper statements during closing argument designed to elicit sympathy for Barth and her family. Slade did not properly present this issue

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<sup>17</sup> *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

<sup>18</sup> MCL 768.29.

<sup>19</sup> *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978).

<sup>20</sup> *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

<sup>21</sup> *Hoskins*, *supra* at 100.

<sup>22</sup> *Heflin*, *supra* at 502.

<sup>23</sup> *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

<sup>24</sup> *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

for review. A party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim.<sup>25</sup> Even if this claim were properly presented, the prosecutor's remarks during closing argument did not improperly appeal to the jury to sympathize with Barth and her family.<sup>26</sup>

Affirmed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

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<sup>25</sup> *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

<sup>26</sup> *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).